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NATIONAL AND INTERNATIONAL APPROACHES TO REPRODUCTIVE AND SEXUAL HEALTH LAW: SUPPLEMENT

PROFESSOR R. J. COOK

FACULTY OF LAW

UNIVERSITY OF TORONTO

2005-2006

These materials have been prepared exclusively for the use of students of the Faculty of Law, University of Toronto

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National and International Approaches to Reproductive and Sexual Health Law: 2005-2006 Supplement

Professor R.J. Cook
Faculty of Law, University of Toronto

1. Introduction (Sept 7)

The texts for the course are:

Cook RJ, Dickens BM and Fathalla MF. *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law*. Oxford: Oxford University Press, 2003 (Green book), updates to the Green book are available at:
http://www.law.utoronto.ca/faculty/cook/ReproductiveHealth.html

2005-2006 Supplement

2. **Overview of Reproductive and Sexual Health Law and Rights** (Sept 14)

A. **Reproductive and Sexual Health -** Green book: 8-33

B. Evolution of Reproductive Health Law and Rights - Green book: 95-109, 154-156

C. Sex and Gender - Lesley Doyal, Gender Equity in Health: Debates and Dilemmas, 2000 Social Science and Medicine 51: 931-939 1

D. Sexuality - Green book: 173-175

E. Human Rights Needs Assessment - Green book: 217-221, 255-59

3. Legal Origins and Principles (Sept 21)

A. Legal Principles
Green Book: 107-9

B. Decision-Making
Green book: Decision Making -109-119
Case Study 3: Adolescent Girl: 276-86

B.M. Dickens and R.J. Cook, Adolescents and Consent to Treatment Int'l J. of Gynecology and Obstetrics 89 (2005): 179-184 10

4. Legal Origins and Principles (Sept 28)

A. Delivery of Services - Green book: 128-139, 144-147

Tort law: Standards for determining medical competence:

Zimmer v. Ringrose (1981), 124 D.L.R. (3rd.) 215 16

Administrative law: Delegation of authority:

Royal College of Nursing of the UK v. Department of Health and Social Security [1981] 1 All ER 545 (House of Lords, England), 135. 21

See also:

Kealey v. Berezowski (1996) 136 D.L.R. (4th) 708 (Ont. H.C.)

McFarlane and another v. Tayside Health Board [1999] 4 All E.R. 961 (House of Lords, Scotland)

Cattanach v. Melchior [2003] HCA 38

B. Aggravated Assault - Green book: 144-47

R. v. Cuerrier (1998) 127 C.C.C. (3d) 1 (S.C.C.) 27

Contrast *Cuerrier* S.C.C., with BC Ct of Appeal decision (1996) 141 D.L.R. (4th) 503 (B.C.C.A.). 33

Larry Gostin, The AIDS Pandemic, Chapel Hill: 2004, Evaluating the Criminal Law as a Tool for Public Health, 195-7 40

See also:

R v. Williams [2003] SCJ No. 41.

Case comment- *R v. Williams* [2003] SCJ No. 41, Canadian HIV/AIDS Policy and Law Review 8(3) 50-53 (2003) Canadian HIV-AIDS Legal Network: www.aidslaw.ca

Bell-Ginsburg v. Ginsburg, (1993) 14 OR (3d) 217 Gen Div (action in tort by a spouse of a bi-sexual man permitted for fraudulent misrepresentation, battery and negligence - mere fact of exposure sufficient to allow cause of action)

OHCHR, UNAIDS, "HIV/AIDS and Human Rights International Guidelines" available: http://www.unaids.org/html/pub/Publications/IRC-pub02/JC905-Guideline6_en_pdf.pdf

Green book: 510-512 (Summary of International Guidelines on HIV/AIDS and Human Rights)

Revised Guideline 6, Access to Prevention, Treatment, Care and Support," UNAIDS/02.49E, August 2002, online: http://www.unaids.org/html/pub/Publications/IRC-pub02/JC905-Guideline6_en_pdf.pdf

Committee on the Rights of the Child, General Comment 3 - HIV/AIDS and the Right of the Child (2003) http://www.unhchr.ch/html/menu2/6/crc/doc/comment.htm

UNAIDS, 2004 Report on the Global AIDS Epidemic, UNAIDS/04.16E, http://www.unaids.org

J.K. Krishna, "The Rights of the New Untouchables: A constitutional analysis of HIV Jurisprudence in India," Human Rights Quarterly 25 (2003): 791

B. Flanagan, HIV/AIDS and Human rights in Russia-Compliance and the Rule of Law, Osgoode Law Journal 39 (2001): 39-76

C. Albertyn, Using Rights and the Law to Reduce Women's Vulnerability to HIV/AIDS-A Discussion Paper, 2000, Gender Research Project, Centre for Applied Legal Studies, University of Witwatersrand, available: www.aidslaw.ca/durban2000/e-durban-women.htm

5. Fairness in Access to Reproductive & Sexual Health Care (Oct 5)

A. Health Care Systems - Green book: Chapter 3: 34-60

Green book: Reproductive Health Data, 405-427 – Review

See also:

World Health Organization, Measuring Access to Reproductive Health Services, 2004, available at: www.who.int/reproductive-health

B. Ways of Thinking about Fairness - Cook, Exploring Fairness in Health Care Reform, 2004 Journal of Juridical Science 29(3): 1-27, read only 1-11 42

CEDAW General Recommendation 24, Green Book 469-477

CESCR General Comment 14, Green book 477-499

6. Implementation of Legal and Human Rights Principles (Oct 12)

A. Development of Legal Claims - Green book: 221-230, 513-516

B. Advancement of Legal Claims - Green book: 230-251

See also:

Human Rights Watch, "Decisions Denied: Women's Access to Contraceptives and Abortion in Argentina" (2005) Vol. 17, No.1(B), available: http://hrw.org/reports/2005/argentina0605/

C. The Role of Courts in Promoting rights relating to health and the benefits of scientific progress - Green book: 162-166, 187-195

Cook, Exploring Fairness in Health Care Reform, 2004 Journal of Juridical Science 29(3): 1, 12-27, supra 54

Minister of Health and others v Treatment Action Campaign [2002] 5 S. Afr. L. R. 721 (S. Afr. Const. Ct) (excerpts) 70

Review relevant paragraphs of:

CEDAW General Recommendation 24, Green Book 469-477

CESCR General Comment 14, Green book 477-499

See also:

Luisa Cabal et al., What Role Can International Litigation Play in the Promotion and Advancement of Reproductive Rights in Latin America?, Health and Human Rights 7 (2003): 50-89

Center for Reproductive Rights (CRR) & Universidad de los Andes School of Law, Bodies on Trial: Reproductive Rights in Latin American Courts, CRR, 2003 www.reproductiverights.org

Reproductive Rights in the Inter-American System for the Promotion and Protection of Human Rights, Center for Reproductive Rights, 2002, available: www.reproductiverights.org

Legal Grounds: Reproductive and Sexual Rights in African Commonwealth Courts (Center for Reproductive Rights/University of Toronto, 2005) available: www.reproductiverights.org

How to Use the European Convention for the Protection of Human rights and fundamental Freedoms in matters of Reproductive Law: The Case Law of the European Court of Human Rights (ASTRA, 2004) available: www.astra.org.pl

7. Human Rights Principles – Rights relating Life, Survival and Security and Sexuality (Oct 19)

Green book: 159-174

A. The Right to Life and Survival- Essential Obstetric Care

Green book, medical aspects 22-25
Green book, Human rights aspects 159-163

Green book, Case Study 16: A Maternal Death, 393-401

See also:

Claiming Our Rights: Surviving Pregnancy and Childbirth in Mali (Center for Reproductive Rights, 2003) available: www.reproductiverights.org

Parkhurst, Penn-Kekana et al., Health Systems Factors Influencing Maternal Health Services, 2005 Health Policy 73: 127-138

B. The Right to Life and Survival-Anti-retroviral and associated treatment

Tutela No. T-505/92, Right of Sick Person/AIDS Patients, Constitutional Court of Colombia, Judgment No. T-505/92, August 22, 1992 in Goldman et al., International Dimensions of Human Rights, Inter-American Development Bank, 2001, 585-91 80

C. The Right to Life and Survival - The Protection of Prenatal Life

Tremblay v. Daigle (1989) 62 D.L.R. (4th) 634 (S.C.C.) (Headnote) 87

Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.) (1997), 152 D.L.R. (4th) 304 (Sup Crt Can) 89

Vo v. France, European Court of Human Rights, Application No. 53924/00, 8/VII/04 (excerpts) 102

Rebecca J. Cook and Bernard M. Dickens, "Human Rights Dynamics of Abortion Law Reform," Human Rights Quarterly 25 (2003): 1, 21-29 124

See also:

Rodgers, S., "The Legal Regulation of Women's Reproductive Capacity in Canada" in Jocelyn Downie, Timothy Caulfield, and Colleen Flood, eds., Canadian Health Law and Policy, 2d ed. (Markham, Ont: Butterworths, 2002), Part III (Judicial Interference with Pregnant Women in the Alleged Interest of the Fetus), 343-357

Melanie Randall, Pregnant Embodiment and Women's Autonomy Rights in Law: An analysis of the Language and Politics of *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.* Saskatchewan Law Review 1999 62: 519-542

R. v. Drummond, [1996] O.J. No. 4597

R. v. Sullivan, [1991] 1 S.C.R. 489; See also the British Columbia Court of Appeal (1988), 31 B.C.L.R. (2d) 145

Dobson (Litigation Guardian of) v. Dobson, [1999] 2 S.C.R. 753

Donna Greschner, "Pregnant with Meaning: Discourse, Democracy, and the Daigle Decision," in L. Samuelson and W. Antony (eds.), Power and Resistance (2nd ed.) (Halifax: Fernwood Publishing, 1998): 155-182

8. Human Rights Principles-Rights relating to Liberty and Security of the Person (Oct 26)

A. Confidentiality

Green book: 120-127, 166-169
Case Study on Confidentiality and Unsafe Abortion: 378-384

See also: IJGO column on confidentiality

B. Sterlization

1. Substitute Decision Making - Green book: 118-119

Re Eve (1986) 31 D.L.R. (4th) 1 (S.C.C.) 129

Colleen M. Olesen, "Eve and the Forbidden Fruit: Reflections on a Feminist Methodology," Dalhousie J. of Legal Studies 3 (1994): 231-240 135

2. Involuntary Sterlization - Green book: 172-173

Green book, Case Study 7 involuntary female sterilization, 315-21

See also:

Muir v. Alberta (1996) 132 D.L.R. (4th) 695 (Alta. Q.B.)

C. Compulsory Diagnostic Testing – Green book: 168-170

See also:

Green book:

Case study 8- Counselling and Caring for an HIV-Positive Woman, 323-335
Case study 9- HIV Drug Research and Testing, 336-344
Summary of International Guidelines on HIV/AIDS and Human Rights, 510-512

Canadian HIV-AIDS Legal Network: www.aidslaw.ca

OHCHR, UNAIDS, "HIV/AIDS and Human Rights International Guidelines: Revised Guideline 6, Access to Prevention, Treatment, Care and Support," UNAIDS/02.49E, August 2002, online: http://www.unaids.org/html/pub/Publications/IRC-pub02/JC905-Guideline6_en_pdf.pdf

D. Sexual Violence – Green book: 170-2

Case Study 15 - Domestic Violence, 385-392

See also: Society of Obstetricians and Gynaecologists of Canada, Intimate Partner Violence – Consensus Statement, SOGC Clinical Practice Guidelines No 157, April 2005, JOGC, 365-388, available: http://www.sogc.org/sogcnet/sogc_docs/common/guide/documents/jogc-april05-ipv-cpdrevised_000.pdf

9. Rights to Non-Discrimination and Due Respect for Difference (Nov 2)

A. Generally - Green book, 196-209, 469-477

Eldridge v. British Columbia (Attorney-General) (1997), 151 D.L.R. (4th) 577 140

Doe et al v. The Government of Manitoba, 2004 MBQB 285 150

See also:

Auton (Guardian ad Litem) v. British Columbia (Attorney-General) (2002) 220 D.L.R. (4th) 411 (B.C.C.A.); [2004] 3 S.C.R. 657

Gosselin v. Quebec (Attorney-General), [2002] 4 S.C.R. 429

Charles Ngwena, Substantive Equality in South African Health Care: The Limits of Law, 2000 Medical Law International 4: 111-131

B. Non-discrimination on Basis of Health Status/Disability – Green book: 207-209

Cameron v. Nova Scotia (1999), 177 D.L.R. (4th) 611 (N.S.C.A.) 163

Green book
Medical aspects, 16-17, 30, 46

Case Study 6-a Request for Medically Assisted Reproduction, 305-314

Canada, Assisted Human Reproduction Act, 2004 177

B.M. Dickens and R.J. Cook, "Some Ethical and Legal Issues in Assisted Reproductive Technology," Int'l J. of Gynecology and Obstetrics 66 (1999): 55-61 234

G.I. Serour and B.M. Dickens, "Assisted Reproduction Developments in the Islamic World," Int'l J. of Gynecology and Obstetrics 74 (2001): 187-193 241

B. **Non-discrimination on the Basis of Age** – Green book: 203-5

R.J. Cook, B.M. Dickens, S. Syed "Obstetric Fistula: The Challenge to Human Rights," Int'l J. of Gynecology and Obstetrics 87 (2004): 72-77 248

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Review: Case Study 3: Adolescent Girl: 276-86

10. Access to Emergency Contraception (Nov 11)
"Developing a Policy on Women's Reproductive and Sexual Health in Ontario-Emergency Contraception" (Dec. 10, 2004) 2pp 266

A. Availability of Emergency Contraception

Smeaton v Secretary of State for Health [2002] EWHC 610 (Admin) (excerpts). 268

B. Mode of Distribution

Erdman JN & Cook RJ, "Protecting Fairness in Women's Health-The Case of Emergency Contraception" forthcoming in Colleen M. Flood, ed., *The Frontiers of Fairness,* Toronto: University of Toronto Press, 2005, 29 pp. 283

See also:

Grimes DA, Switching EC to Over-the-Counter Status (2002) 347 (11) *New England Journal of Medicine* 846-849

C. Coverage Issues

R (on the application of Pfizer Ltd) v Secretary of State for Health [2002] EWCA Civ 1566, 70 BMLR 219 (ban on the availability of Viagra in the UK National Health Service upheld) (excerpts) 308

See also:

Green book:
Safety and Efficacy of Products, 142-44
Case study 4: Sexual Assault and Emergency Contraception, 287-97

Dunn S & Guilbert E, Society of Obstetricians and Gynaecologists of Canada (SOGC) Clinical Practice Guidelines: Emergency Contraception (2003) 131 Journal of Obstetrics and Gynecology of Canada 1-7

American College of Obstetricians and Gynecologists, "Emergency Oral Contraception," ACOG Practice Bulletin 25 (March 2001): 334-340

Steven Smugar et al., Informed Consent for Emergency Contraception; Variability in Hospital Care of Rape Victims, Am J of Public Health 90: 1372-6 (2003)

College of Pharmacists of British Columbia, "Regulatory Basis for Pharmacist Independent Prescribing Emergency Contraception Pills," 27 September 2002

Cook, RJ & Dickens BM, "Access to Emergency Contraception" (2003) 25(11) Journal of Obstetricians and Gynaecologists of Canada 914-916; Letters to the Editor, Journal of Obstetricians and Gynaecologists of Canada (JOGC), Feb 04, 1-2, and JOGC, Aug 04, 705-7

R.J. Cook, B.M. Dickens, C. Ngwena and M.I. Plata, "The Legal Status of Emergency Contraception," Int'l J. of Gynecology and Obstetrics 75 (2001): 185-191

Meika Loe, The Rise of Viagra, New York University Press, 2004

11. Access to Abortion Services (Nov 23)

Rodgers, S., "Abortion Denied: Bearing the Limits of Law" forthcoming in Colleen M. Flood, ed., *The Frontiers of Fairness*, (Toronto: University of Toronto Press, 2005) 20pp 313

See also:

Rodgers, S., "The Legal Regulation of Women's Reproductive Capacity in Canada" in Jocelyn Downie, Timothy Caulfield, and Colleen Flood, eds., *Canadian Health Law and Policy*, 2d ed. (Markham, Ont: Butterworths, 2002), Part II (State Policy on Abortion), 333-343

Kouri, R.P., "The Actualization of Reproductive Rights through Access to Emergency Oral Contraception and Abortion in Quebec" forthcoming in Colleen M. Flood, ed., *The Frontiers of Fairness*, (Toronto: University of Toronto Press, 2005), Part II, "Abortion: a right compromised by restricted access."

A. Provincial Insurance Coverage

Doe et al. v. The Government of Manitoba, 2004 MBQB 285, supra 150

See also:

Lexogest Inc. v. Manitoba (A.G.) (1993), 101 D.L.R. (4th) 523 (Man. C.A.)

Morgentaler v. Prince Edward Island (Minister of Health and Social Services) (1996), 139 D.L.R. (4th) 603 (P.E.I.C.A)

Morgentaler v. New Brunswick, [2004] N.B.J. No. 130 (QL)

B. Sex Selection

B.M. Dickens, G.I. Serour, R.J. Cook, R.-Z. Qiu, "Sex Selection: Treating Different Cases Differently," Int'l J. of Gynecology and Obstetrics 90 (2005): 171-177 327

Green book: Case Study 12-Sex Selection Abortion, 363-371

See also:

Canadian Abortion Rights Action league (CARAL), *Protecting Abortion Rights in Canada: A Special Report to Celebrate the 15th Anniversary of the Decriminalization of Abortion* (Ottawa: Canadian Abortion Rights Action League, 2003), available online: http://www.caral.ca/uploads/caralreporti.pdf

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World Health Organization (WHO), Safe Abortion: Technical and Policy Guidance for Health Systems, WHO, 2003, available at: http://www.who.int/reproductive-health/publications/safe_abortion/safe_abortion.html

Rebecca J. Cook, Bernard M. Dickens and Mihai Horga, Safe Abortion: WHO Technical and Policy Guidance, Int'l J. of Gynecology and Obstetrics 86 (2004) 79-84

12. Rights relating to Information, Education and Decision-making (Nov 30)

A. Right to Receive and Impart Information- Green book 209-211

Open Door Counselling and Dublin Well Woman v. Ireland (1992) 15 E.H.R.R. 244 334

Ontario (A.G.) v. Dieleman (1994), 20 O.R. (3d) 229 - "Bubble Zones" - Restrictions on Protest Activity 355

B. Right to Freedom of Thought, Conscience, and Religion

Green book:

Legal aspects: 139-42
Human rights aspects: 213-4
Janaway v. Salford Area Health Authority [1989] AC 537 (HL): 519

Pichon and Sajous v. France, App. No. 49853/99, Eur. Court of Human Rights (2001) 366

Rebecca J. Cook and Bernard M. Dickens, "Human Rights Dynamics of Abortion Law Reform," Human Rights Quarterly 25 (2003): 1, 50-52 371

See also:

www.consciencelaws.org

The website is entitled "The Protection of Conscience Project." Its purpose is to:
1) advocate for protection of conscience legislation;
2) facilitate communication and co-operation among protection of conscience advocates;
3) provide legislative draftsmen with useful information.

B.M. Dickens and R.J. Cook, "The Scope and Limits of Conscientious Objection," Int'l J. of Gynecology and Obstetrics 71 (2000): 71-77

13. Wrap-up and Questions (Dec 7)

xxx

Annotated Listing of Relevant Websites, Green book: 532-542 – **updates:**

Canadian HIV/AIDS Legal Network
http://www.aidslaw.ca

The network promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally through research, legal and policy analysis, education, advocacy, and community mobilization.

Canadian Women's Health Network (CWHN)

http://www.cwhn.ca

Network of individuals, groups, organizations and institutions concerned with women's health. The CWHN recognizes the importance of information sharing, education and advocacy for women's health and equality. We work to build and strengthen the women's health movement in Canada and throughout the world.

Center for Reproductive Rights
www.reproductiverights.org

changed from Center for Reproductive Law and Policy

International Women's Rights Action Watch-Asia Pacific
www.igc/iwraw-ap.org

IWRAW Asia Pacific, a non-profit international women's organisation based in the South, promotes the domestic implementation of international human rights standards by building the capacity of women and human rights advocates to claim and realise women's human rights. This is done through the development of new knowledge and the utilisation of a rights-based approach to women's empowerment. In addition to information about our work, this website has been designed to provide official and practical information on the application of the UN CEDAW Convention and other international human rights treaties.

Kaiser Network Organization
www.kaisernetwork.org

The Henry J. Kaiser Family Foundation is a non-profit, private operating foundation focusing on the major health care issues. The *Kaiser Daily HIV/AIDS Report* and the *Kaiser Daily Reproductive Health Report* provide daily email summaries of news stories with links to the original articles and a fully searchable archive.